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Recommended Citation

Kramer, Larry (1991) "More Notes on Methods and Objectives in the Conflict of Laws," *Cornell International Law Journal*: Vol. 24: Iss. 2, Article 4.

Available at: <http://scholarship.law.cornell.edu/cilj/vol24/iss2/4>

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More Notes on Methods and Objectives in the Conflict of Laws

The late 1950s and early 1960s must have been an exciting time for choice-of-law scholars. Brainerd Currie published his landmark studies of *Milliken v. Pratt*¹ and *Grant v. McAuliffe*² in 1958, and these had an immediate and profound effect on the field.³ Within a few years, a number of other scholars published their best work, either building on or reacting to Currie.⁴ Yet while Currie is remembered as the father of modern choice-of-law theory, he was initially reluctant to portray his ideas as general theory. His studies of married women's contracts and tort survival statutes, for example, were carefully limited to those particular problems, with few pretensions to articulating a broader method.⁵

But the implications of Currie's analysis for choice-of-law theory were too obvious to avoid, and Currie soon saw the need to present his ideas in a more general form. The occasion he chose was, like this, an annual meeting of the American Association of Law Schools, and at a

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Presented to the Conflict of Laws Section at the 1991 Annual Meeting of the American Association of Law Schools. I am grateful to participants for their helpful comments. I would also like to thank David Currie and Herma Hill Kay for commenting on an earlier draft.

1. 125 Mass. 374 (1878).

2. 41 Cal. 2d 859, 264 P.2d 944 (1953).

3. See Currie, *Married Women's Contracts: A Study in Conflict-of-Law Method*, 25 U. CHI. L. REV. 227 (1958); Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958). These articles are reprinted as chapters two and three of Currie's *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963) [hereinafter Currie, *SELECTED ESSAYS*].

4. See, e.g., Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963); D. CAVERS, *THE CHOICE OF LAW PROCESS* (1965); A. EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* (1962); Hill, *Governmental Interest and the Conflict of Laws — A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* (1965).

5. See, e.g., Currie, *SELECTED ESSAYS*, *supra* note 3, at 107 (explaining that the analysis of *Milliken v. Pratt* offers a solution "not for conflict of laws in general, nor for the whole vexed problem of contracts in the conflict of laws, nor for all questions of validity, but only for this one, small, trite, and not very practical problem concerning married women's contracts").

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roundtable held on December 29, 1958, Currie delivered a short paper entitled *Notes on Methods and Objectives in the Conflict of Laws*. Subsequently published in the 1959 volume of the Duke Law Journal⁶ and then as chapter four of *Selected Essays on the Conflict of Laws*,⁷ this talk constitutes Currie's most succinct statement of governmental interest analysis—especially the last four pages, which set forth Currie's method in a simple series of five steps. For this reason, *Notes on Methods and Objectives* is probably Currie's most cited article.

I propose on this occasion to reconsider Currie's approach in the hope of freeing myself, and perhaps some other scholars, from his long shadow. We have in the past twenty-five years improved our understanding of choice of law in ways that move well beyond Currie's insights. Yet Currie's writings—including his particular formulation of a choice-of-law method—continue to dominate discussion and set the agenda. Thus, recent books by two noted and active conflicts scholars are devoted in large measure to defending or criticizing Currie, with most subsequent work relegated to footnotes.⁸ Generally speaking, the work of scholars classified as interest analysts tends to be measured by its fidelity to Currie, while scholars who reject interest analysis set themselves in opposition to Currie alone without seriously engaging anyone or anything else.

Why this should be so is not entirely clear. Brainerd Currie's work unquestionably marked a turning point in conflicts scholarship, but the time to debate Currie on his terms has long since passed. To be sure, many of Currie's ideas still make sense, and we should use these (together with the insights of his critics and supporters) to build a better approach. But Brainerd Currie's "governmental interest analysis" should no longer provide the benchmark against which other ideas are measured. It is time for scholars in the choice-of-law field to begin debating each other.

Ironically, it seems that the best way to get beyond Currie is to debate him one last time in order to put his ideas in perspective. And precisely because it is so succinct, Currie's *Notes on Methods and Objectives in the Conflict of Laws* provides a convenient vehicle for reexamining his work. The discussion below therefore uses this neatly packaged presentation to explore respects in which Currie's ideas remain current and respects in which they have been or should be superseded. When finished, I hope to reach some conclusions that provide the basis for a new agenda.

Part I of this Article briefly restates Currie's method as presented to the AALS thirty years ago. Part II then offers a critique of this method

6. Currie, *Notes on Methods and Objectives in Conflicts of Laws*, 1959 DUKE L.J. 171.

7. See *supra* note 3.

8. Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 9 (1989-III); L. BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* (1991). The second half of Professor Brilmayer's book begins to articulate an alternative approach.

that contains the elements of an alternative approach. The critical step, described in Part II-A, is to reorient choice-of-law analysis by viewing it in its ordinary procedural context. This means understanding choice of law as part of the process of defining the elements of a claim or defense, to be resolved accordingly. In litigation, each party offers its version of the facts and argues that it is entitled to some sort of relief under the law applicable to those facts. The court must decide whether the law cited gives the parties the relief they seek on the facts alleged. Choice of law is merely one aspect of this determination—one that is not qualitatively distinct from other, more familiar aspects.

Part II-B considers some implications of this reorientation for choice-of-law analysis. While at first blush it seems to confirm Currie's insights, carefully working through the choice-of-law process from this perspective suggests abandoning or modifying central tenets of interest analysis. These include (1) the initial presumption of forum law; (2) the state's power to define its own interests; (3) the idea that the *renvoi* is no longer a problem; (4) the existence of "unprovided-for" cases; and (5) the resolution of true conflicts by applying forum law. Part III concludes with a proposed list of steps to follow in resolving choice-of-law disputes together with some suggestions for future research.

I. Methods and Objectives: A Summary

"The central problem of conflict of laws," Currie says, "may be defined . . . as that of determining the appropriate rule of decision when the interests of two or more states are in conflict—in other words, of determining which interest shall yield."⁹ This problem is unavoidable in a world in which different sovereigns may enact different laws. It could perhaps be solved by treaty or federation, but even these solutions have difficulties, and in any event the appropriate political actors simply "have not done the job."¹⁰

We are left, then, with "the resources of jurisprudence," and it is judges who must bring order to the jumbled mix of conflicting state laws.¹¹ At first, Currie observes, the judges try to hide what they are doing, even from themselves. Rather than admit that they are assigning priorities to the policies of sovereign states, they talk about "metaphysical questions concerning the nature of law and its abstract operation in space."¹² From these, they fashion a system of rules for determining which state's law must, in the nature of things, control. If all states can be persuaded to adopt these rules, uniformity and certainty in the administration of the law will have been achieved and the choice-of-law project will be complete.

9. Currie, *supra* note 6, at 173.

10. *Id.*

11. *Id.*

12. *Id.* at 173-74.

The problem, Currie continues, is that choice-of-law rules formulated in this manner "have not worked and cannot be made to work" because they are not consonant with actual state interests.¹³ As a result, the rules create false problems by requiring a choice in cases where there is no real conflict of interests. Worse, the rules "solve" many of these false problems in an irrational manner by calling for the law of an uninterested state and thereby defeating another state's interest without advancing any interest of the state whose law is applied.¹⁴

On top of that, courts "simply will not always remain oblivious to the true operation of a system which, though speaking the language of metaphysics, strikes down the legitimate application of the policy of a state, especially when that state is the forum."¹⁵ The judges therefore load up on "escape devices" that enable them to manipulate outcomes. This works to everyone's advantage when a "sensitive and ingenious court can detect an absurd result and avoid it,"¹⁶ but it leaves us to defend the system by arguing that the unacceptable results it inevitably produces can be avoided by disingenuous judging. Moreover, there is a constant danger that judges who lack sensitivity and ingenuity may employ the escape devices to avoid proper results that the rules direct (albeit fortuitously). And even with these devices, "instances of mechanical operation of the rules to produce indefensible results are by no means rare."¹⁷ Consequently, not only do the rules defeat state interests, but they fail even to achieve the benefits of uniformity and predictability.¹⁸

Nor, Currie explains, can these problems be solved by devising different choice-of-law rules, for where state interests genuinely conflict, *no* judicially developed rule is adequate:

a court is in no position to "weigh" the competing interests, or evaluate their relative merits, and choose between them accordingly [A]ssessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function which should not be committed to courts in a democracy. It is a function which the courts cannot perform effectively, for they lack the necessary resources.¹⁹

There is, according to Currie, only one body competent to make authoritative judgments about the relative importance of state policies—the United States Congress. But Congress has not acted and is not likely to act in the foreseeable future. In the meantime, we should at least "admit the teachings of sociological jurisprudence into the conceptualistic precincts of conflict of laws" by choosing the applicable law on the

13. *Id.* at 174.

14. *Id.*

15. *Id.* at 175.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 176.

basis of actual state interests.²⁰ This, Currie concludes, implies a method along the following lines:

1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.
2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.
3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.
4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.
5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.²¹

II. Critique and Comparison

A. Putting Choice of Law in Context

The problem with this analysis is that Currie starts with the wrong question. That is, Currie assumes that choice-of-law problems arise only in multistate cases, and he therefore defines the inquiry in terms of choosing between the potentially conflicting laws of different states. Currie is not the only person to do this, of course. On the contrary, I think it fair to say that probably every other choice-of-law scholar defines the question in similar terms.

One consequence of thinking about choice of law in these terms is that it restricts the field to allocating the lawmaking power of sovereign states. But while defining the limits of legislative jurisdiction is undoubtedly part of the choice-of-law process, we cannot know whether it is the *whole* process without asking a more fundamental question: how do we know when a case presents a choice-of-law problem? The answer

20. *Id.* at 177-78.

21. *Id.* at 178. Currie produced several less well known lists of steps to follow in analyzing choice-of-law cases. See Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1242-43 (1963); Kay, *supra* note 8, at 76 (reprinting a list prepared by Currie in 1964 for inclusion in a casebook). These later lists differ in some respects, reflecting changes in Currie's thinking. Where pertinent, the discussion below includes such modifications.

to this question may—indeed, as the remainder of this Article suggests, does—reveal choice of law in a light that clarifies both the nature of the problem and its solution.

So how do we know what cases present choice-of-law problems? In a sense, the answer is easy: any case in which more than one law is applicable to determine the parties' rights in the litigation. But that is too easy. How do we know when more than one law applies? To answer that, we need to forget (or at least to put aside) broad theoretic questions about allocating legislative jurisdiction and start with a simple complaint and some basic propositions about the legal system. We need, in other words, to examine choice of law from the "bottom up" rather than from the "top down."

A lawsuit is a claim by one party that he or she is entitled to relief from another party because of something that happened or failed to happen. To recover, the claimant must establish some set of facts and show that, because these facts are true, some rule of law entitles the claimant to a remedy. The complaint sets forth the events that supposedly give rise to the right to relief. The plaintiff pleads: "A, B, C, and D happened. Therefore I am entitled to damages." Whether the plaintiff is in fact entitled to damages (or whatever remedy is requested) depends first on whether A, B, C, and D actually happened, and second on whether, *if* A, B, C, and D happened, there is a law providing for recovery.

The first determination (whether A, B, C, and D happened) is made through one of the legal system's various factfinding mechanisms: trial, summary judgment, stipulation, judicial notice. The second determination (whether plaintiff is entitled to recover on those facts) is made through one of the mechanisms for testing the legal sufficiency of a party's arguments: motion to dismiss for failure to state a claim (i.e., FRCP 12(b)(6) or demurrer), argument over jury instructions, summary judgment, directed verdict. The judge makes this second determination by interpreting the law offered by plaintiff in support of his or her claim and deciding what facts must be proved to recover—deciding, in other words, what the elements of the claim are.

To illustrate, suppose a plaintiff files a complaint alleging that the defendant ran a stop sign on a side street at sixty miles per hour and hit the plaintiff, a pedestrian who was crossing the street at the time. The plaintiff seeks compensatory and punitive damages. The defendant moves to dismiss the punitive damages claim on the ground that these allegations fail to establish a right to such damages. The court must decide whether running a stop sign on a side street at sixty miles per hour is conduct that warrants punitive damages. Given these facts, the claim would probably survive if the court found punitive damages authorized on a showing of recklessness or gross negligence; but it would be dismissed if the court required some higher threshold, such as deliberate intent to inflict harm.

Such decisions are standard fare in ordinary litigation. How the court makes them depends on whether the rule invoked by the plaintiff is common or statutory law. If plaintiff relies on common law, the court will presumably decide whether the plaintiff states a claim by reading prior precedents in light of whatever equitable and policy arguments are offered to distinguish them. If the plaintiff relies on a statute, the court's decision will turn on its approach to statutory construction. The statute may clearly state that punitive damages are available on a particular showing, in which case the language will almost certainly control. If the statute's language is unclear, however, the interpretive problem becomes more difficult. Interpreting statutes to fill gaps or resolve ambiguities is quite controversial,²² but whatever technique the courts of a particular state use provides the mechanism for determining the elements of the plaintiff's claim.

Whether the court must decide a choice-of-law question depends on how the defendant answers the complaint. The defendant may respond to plaintiff's claim for punitive damages in at least four ways: (1) deny that the facts alleged are true; (2) admit that the facts alleged are true but deny that the law awards punitive damages on those facts (for example, argue that plaintiff must show deliberate intent to cause injury); (3) admit that the facts alleged are true but argue that a different rule of law applies and prevents plaintiff from recovering punitive damages; or (4) admit that the facts alleged are true but plead additional facts that implicate a different rule of law under which plaintiff cannot recover punitive damages. The third and fourth responses present a choice-of-law problem in that they require the court to choose between potentially inconsistent laws.

Consider the third response. Assume, for example, that plaintiff bases his or her claim on a statute authorizing punitive damages when defendant's gross negligence causes a "vehicular collision." The defendant moves to dismiss, arguing that this statute applies only to collisions between vehicles and that single car accidents remain under the common law, which (let us suppose) requires showing deliberate intent to cause injury. This presents the court with a straightforward choice-of-law problem: is the plaintiff's claim governed by the statute or by the common law?

The first question to ask in addressing this problem is whether the laws actually conflict—whether, in other words, there are reasonable grounds for believing that both laws might apply. The apparent applicability of the common law seems clear, so the court must decide whether there is any basis for concluding that the punitive damages statute also applies. If, as the defendant contends, the phrase "vehicular collision" refers only to accidents between vehicles, the laws do not conflict and

22. There is an enormous literature on the subject. Summaries of the basic positions may be found in Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987), and C. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* ch. 4 (1990). See also *infra* notes 49-59 and accompanying text.

the plaintiff's recovery is limited to the remedy allowed at common law. If the plaintiff is right, however, and the statute reaches any accident involving a vehicle, there is a conflict of laws.

Which of these interpretations should the court choose? Hopefully, the statute's language will make the decision an easy one. If it does not, a more complicated process of interpretation will be required. In any event, suppose the court agrees with the plaintiff that the statute reaches any accident involving a vehicle. This means that both the statute and the common law appear applicable—one allowing, the other prohibiting, punitive damages in this case. The court must therefore employ some further principle of interpretation to choose between them. The court may, for example, conclude that the statute displaces the common law based on principles of legislative supremacy. Alternatively, the court could find that the state's lawmakers have provided alternative remedies, leaving plaintiffs free to elect the one they prefer.

A choice-of-law problem may similarly arise if the defendant selects the fourth option and pleads additional facts suggesting the applicability of another law. Suppose, for instance, that the defendant answers that he or she is a police officer and that the accident occurred while he or she was answering a call. The defendant argues that these facts establish an affirmative defense under a different statute prohibiting awards of exemplary damages against police officers acting within the scope of their employment. Once again, the court must choose between two seemingly applicable laws that require inconsistent results in this case: a statute authorizing punitive damages in cases involving vehicular collisions and a statute prohibiting such damages when the defendant is a police officer. Here, the court might rely on priority of enactment and hold that the later enacted provision creates an exception to the earlier of the two statutes.²³

This discussion suggests several points. *First*, it suggests that choice-of-law problems are not limited to cases with multistate contacts, but may arise in wholly domestic cases as well. Upon reflection, this is hardly surprising. A conflict of laws, after all, is just that—a clash of legal rules, not legal systems—and such clashes may arise among the laws of a single system. Legislators are seldom fully versed in their own work, much less the work of courts or earlier legislatures. Moreover, laws that do not appear to overlap when enacted may come into conflict through judicial interpretation. As a result, there are inevitably overlapping and inconsistent rules of decision within a single jurisdiction.

Second, the process of determining whether there is a conflict and, if so, how that conflict should be resolved is merely the familiar one of determining the elements of a claim or defense. A choice-of-law problem thus arises whenever the parties disagree about what law or laws

23. See, e.g., 2A C. SANDS, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 51.02 & n.7 (N. Singer rev. 4th ed. 1984).

determine the legal sufficiency of their contentions.²⁴ Resolving such disputes is a two-step process of interpretation. In the first step, the court identifies the kinds of facts that make each law applicable, usually by examining the law's internal logic and purpose. Then, if a conflict is revealed, the court resolves it with an additional set of interpretive tools, including such familiar techniques as reading statutes *in pari materia* or invoking canons of construction like the principle that implied repeals are disfavored and specific provisions are not controlled by general provisions.²⁵

Third, moving from wholly domestic cases to cases with multistate contacts does not change the essential nature of the interpretive problem. A lawsuit with multistate contacts is still just a lawsuit. The plaintiff still alleges that because something happened he or she is entitled to a remedy. The court must still determine whether the facts alleged are true, and if they are true, whether some rule of positive law confers a right to recover. Making this determination is still a problem of interpreting the laws offered by the parties to support their contentions. The only difference is that, instead of asking whether the plaintiff must prove that the defendant was grossly negligent or not acting within the scope of his or her employment, we ask whether the plaintiff must prove that he or she is from the state or that the accident occurred within the state. The spatial reach of a law, in other words, is simply another element of a claim or defense based on that law, to be determined accordingly.

It follows that if the parties do raise a choice-of-law problem in a multistate case, it can be resolved with basically the same two-step process used in domestic cases. Thus, the court should begin by examining the laws in issue to determine whether both may potentially apply—i.e., to determine whether there is a conflict. What makes this difficult is that lawmakers seldom think about multistate cases and therefore seldom specify the territorial contacts that make their laws applicable.²⁶ But this means only that the judge cannot rely on plain language and must engage in the more difficult interpretive task of filling a gap to cover unanticipated circumstances—something courts do all the time in defining the elements of a claim.²⁷ If this process reveals that more than

24. We could require the court to raise choice-of-law issues on its own motion. As the law now stands, however, the argument that a claim or defense is insufficient may be waived. *See, e.g.*, *Brule v. Southworth*, 611 F.2d 406, 409 (1st Cir. 1979); *Simpson v. Providence Wash. Ins. Group*, 608 F.2d 1171, 1174 (9th Cir. 1979); *Black, Sivalls & Bryson, Inc. v. Shondell*, 174 F.2d 587, 590 (8th Cir. 1949). As a practical matter, this leaves the decision to make an issue of choice of law to the parties.

25. For a discussion and analysis of examples, see Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 284-89 (1990).

26. This is not always true. *See, e.g.*, GA. CODE ANN. § 33-34-7 (1982)(no-fault insurance); TEX. INS. CODE ANN. art. 21.42 (Vernon 1981) (insurance contracts). Such provisions are rare, however.

27. Consider, for example, the well known line of cases in which the Supreme Court defined the elements of a claim under 42 U.S.C. § 1983; including what must be pleaded to establish municipal liability, *see Monell v. Department of Social Servs.*,

one state's law applies, the court must, as in domestic cases, employ some further principle of interpretation to choose between them. This too may prove difficult because, rather than simply accommodating the need for coherence within a single legal system, the court must worry about accommodating the objectives of independent sovereigns. As explained below, however, while accommodating the policies of different states changes the form of the solution, it does not affect its fundamental purpose or the legitimacy of the process.²⁸

B. Implications for Governmental Interest Analysis

Suggesting that choice of law is an aspect of determining the elements of a claim or defense seems at first to confirm Currie's insight that the choice-of-law process "is essentially the familiar one of construction or interpretation."²⁹ But this is true only in a superficial sense, for if one examines Currie's method closely, it becomes clear that analyzing choice of law from this perspective has profound implications for interest analysis. The best way to see this is by reexamining Currie's method as outlined in *Notes on Methods and Objectives in the Conflict of Laws*.

1. The Initial Presumption of Forum Law

Start with the first step: "Normally . . . the court should be expected . . . to apply the rule of decision found in the law of the forum."³⁰ Currie developed this initial presumption of forum law while analyzing *Walton v. Arabian American Oil Co.*,³¹ an action by a citizen of Arkansas injured by employees of a Delaware corporation in Saudi Arabia. A New York federal court dismissed, holding that New York choice-of-law rules required plaintiff to rely on the law of Saudi Arabia but that plaintiff had not proved the content of that law.³² Currie thought it ludicrous for New

436 U.S. 658 (1978); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); who must plead the good or bad faith of the acting government official, *see Tenny v. Brandhove*, 341 U.S. 367, 376 (1951); *Gomez v. Toledo*, 446 U.S. 635 (1980); what kinds of damages are recoverable, *see Smith v. Wade*, 461 U.S. 30 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); and whether exhaustion of state remedies is required, *see Patsy v. Board of Regents*, 457 U.S. 496 (1982).

28. *See infra* notes 90-108 and accompanying text.

29. Currie, *supra* note 6, at 178.

30. *Id.* Currie first explored this idea in *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958), subsequently reprinted as chapter one of Currie, *SELECTED ESSAYS*, *supra* note 3. Professor Kay suggests that Currie may have abandoned this first step because it is not included in his later lists. Kay, *supra* note 8, at 75. But the later lists still begin the analysis only "[w]hen a court is asked to apply the law of a foreign state . . .," *id.* at 76, which reflects the initial presumption of forum law. Certainly it is unlikely that Currie would have abandoned a major tenet of interest analysis without a word of explanation. Instead, while Currie did soften his early position that forum law should be used to decide true conflicts, *id.* at 68-73, he continued even in his late writings to rely on this initial presumption of forum law to solve a variety of problems. *See, e.g.,* Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 779-80 (1963).

31. 233 F.2d 541 (2d Cir. 1956), *cert. denied*, 35 U.S. 872 (1956).

32. *Id.* at 542-43.

York to prefer another state's law absent a showing that the other state was interested. The "normal and natural" practice, Currie urged, is to presume that forum law applies unless and until a party who stands to benefit from another state's law makes an affirmative showing that the other state is interested.³³ Because no Saudi interest had been shown in *Walton*, there was no reason to displace New York law. Therefore, Currie concluded, even though New York had no interest, the court should have allowed plaintiff to recover under New York law.³⁴

Can it really be "normal and natural" for an Arkansas plaintiff injured in Saudi Arabia by a Delaware defendant to recover under New York law? The proposition seems inconsistent with our most fundamental intuition about law—that its function is to regulate human action and its consequences. One would think that the applicable law ought normally to have *something* to do with the real world events that gave rise to a dispute. To be sure, we give parties a choice of forums in which to litigate. But that simply reflects our recognition that because courts in different locations possess the skill and facilities to conduct litigation, making causes of action "transitory" can serve everyone's interests. It has nothing to do with the applicable law. On the contrary, the concerns that determine jurisdiction overlap only partially with the concerns underlying choice of law.³⁵ Why, then, should choice of law be made to turn on the vagaries of jurisdiction law and the happenstance of forum selection?³⁶

Once one understands choice of law as a question of the sufficiency of a claim or defense, moreover, it becomes clear that there is no need for a presumption of forum law.³⁷ In ordinary domestic cases, the plaintiff's complaint is presumed sufficient until the defendant challenges

33. Currie, *SELECTED ESSAYS*, *supra* note 3, at 9, 46-48, 75.

34. Note that the presumption of forum law is not sensitive to the outcome. Currie would have been just as satisfied to see the plaintiff's claim in *Walton* dismissed if that had been the proper result under New York law.

35. For example, jurisdiction to adjudicate may turn on the convenience of litigating in a particular forum. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). Similarly, while there is a state interest component to jurisdictional analysis, it is different from the concept of interest used in choice of law. *See id.* at 114-15; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Supreme Court has thus been careful to point out that just because a state may exercise jurisdiction does not mean that it may apply its law, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and, conversely, that just because a state may *not* exercise jurisdiction does not mean that its law may *not* apply, *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

36. *Cf.* Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 82-83 (1978) (noting that choice of law generally has a greater impact on the parties than judicial jurisdiction).

37. The discussion below borrows from an earlier critique of Currie's first step. *See Kramer, Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301 (1989).

it.³⁸ Once the defendant challenges plaintiff's right to recover, this "presumption of sufficiency" disappears, having served its purpose of allocating the burden of raising the issue. The burden then shifts to the plaintiff to show that his or her complaint states a claim—i.e., to show that some law entitles him or her to recover on the facts pleaded. The plaintiff can make this showing by citing appropriate legal authorities in papers submitted to the court. However, because stating a claim upon which relief can be granted requires supporting law, the plaintiff must either identify a rule of positive law entitling him to recover or suffer a dismissal.

To illustrate, recall the hypothetical tort claim discussed above, but this time assume there is no statute authorizing recovery of punitive damages in cases of vehicular collision. Because challenges to the sufficiency of a claim may be waived, the plaintiff may still recover such damages if the defendant fails to seek a dismissal.³⁹ Once the defendant moves to dismiss, however, the presumption of sufficiency ceases, and the burden shifts to the plaintiff to come up with a legal basis for recovering punitive damages on the facts alleged. Thus, suppose the defendant moves to dismiss on the ground that the state's common law awards punitive damages only on a showing of deliberate intent to cause injury. If the court agrees and the plaintiff cannot in good faith plead this allegation, the plaintiff must show the court some other law that entitles him or her to punitive damages on these facts. Otherwise, the plaintiff's claim will be dismissed.

These procedures work just as well in cases with multistate elements. In *Walton*, for example, if the defendant had not challenged the sufficiency of the plaintiff's claim, the plaintiff could have recovered without any determination of whether his right was based on New York or Saudi law. But the defendant *did* challenge the plaintiff's right to recover, persuading the court that the plaintiff had no right under New York law because the accident occurred in Saudi Arabia. At that point, the presumption of sufficiency disappeared, and the burden shifted to the plaintiff to cite some other law entitling him to recover. By failing to do so, the plaintiff failed to establish that his complaint stated a claim upon which relief could be granted. The court, quite rightly, dismissed.⁴⁰

38. See cases cited *supra* note 24. The analysis is written from the standpoint of a challenge to the plaintiff's claim, but it would be the same if the sufficiency of an affirmative defense were at issue.

39. *Id.*

40. The plaintiff declined the trial court's offer to stay the proceedings so that he could research Saudi law, choosing instead to risk an appeal on the question of recovery under New York law. The court of appeals affirmed the lower court's determination that New York did not give the plaintiff a right to recover because his injuries were inflicted outside New York. The court then held that it was too late for the plaintiff to argue that he was entitled to recover under some other law. Judge Frank dissented, arguing that the plaintiff should be given another opportunity. *Walton*, 233 F.2d at 546.

All this seems sufficiently straightforward to ask why Currie thought he even needed a presumption of forum law. In Currie's system, state interests ordinarily provide the basis for choosing the applicable law. But there are cases, like *Walton*, in which interest analysis yields no definitive solution. Yet "justice between the parties" still requires that a law be chosen in order for the court to render a "decision on the merits."⁴¹ And where else, Currie reasons, should a court look for the rule that will best do justice between the parties than to "the body of principle and experience which has served that purpose, as well as the ends of governmental policy, for the people of [the state] in their domestic affairs?"⁴²

The conceptual understanding of choice of law implicit in this analysis is revealing. Deciding a case with multistate contacts, it seems, is a two-step process: first the court *chooses* a law to govern the dispute, then the court *applies* the chosen law and in this way renders "a decision on the merits." Consequently, when the initial choice cannot be made by analyzing state interests, some other basis must be found, because the court cannot reach the merits until it chooses an applicable law. The presumption of forum law fills this desideratum.⁴³

But where did Currie get the idea that "choosing" an applicable law is something distinct from, and antecedent to, the process of "applying" a law to decide the merits? The analysis in Part II-A suggests that this is simply wrong. A plaintiff makes a claim for relief. To prevail on this claim, the plaintiff must prove certain facts and show that a rule of positive law entitles him or her to relief on those facts. If the defendant shows that New York confers no right because neither the parties nor the conduct is connected to New York, the plaintiff must find some other law that confers such a right. If the plaintiff fails to do so, the court may dismiss, and its dismissal is on the merits—just like any dismissal for failure to state a claim upon which relief can be granted.

What is striking about Currie's analysis of this point is that it is so needlessly conceptualistic—the very vice he attributed to traditional choice-of-law theorists. That is, Currie needs a presumption of forum law only because he assumes that choice of law is antecedent to and independent of other aspects of the litigation process. I suspect that Currie made this assumption because he defined choice-of-law problems as arising only in multistate cases. Such a definition suggests that choice of law is analytically distinct from questions that arise in ordinary domestic litigation, thereby obscuring its relation to these questions.

Before leaving this subject, I want briefly to comment on a different argument sometimes offered in support of Currie's initial presumption

41. Currie, *SELECTED ESSAYS*, *supra* note 3, at 64-65.

42. *Id.*

43. Hence, in addition to cases like *Walton*, the presumption also dictates the outcome in other cases that cannot be resolved on the basis of state interests, such as "unprovided-for" cases and true conflicts litigated in a disinterested forum. See Currie, *SELECTED ESSAYS*, *supra* note 3, at 152; Currie, *The Disinterested Third State*, *supra* note 30, at 779-80.

of forum law: the argument that judges are most familiar with their own law. Perhaps this argument has some force in the international context, where differences in language and culture increase the burden of comprehending foreign law. It may thus have had force in *Walton*, where the record suggests that determining the content of Saudi law was extremely difficult. In the typical conflict between states of the United States, however, this argument has no force at all. Access to the laws of sister-states is easy given regional reporters, LEXIS, and WESTLAW; and legal and cultural differences between states are sufficiently small to make comprehension easy. That judges might have to learn something new is hardly a compelling argument. Besides, they can (and ordinarily should) make the parties do this work in briefs submitted to the court. Consequently, given the truly "normal and natural" assumption that the applicable law should have something to do with the events underlying a dispute, judges' familiarity with forum law is no reason at all for a presumption of forum law.

2. *The Determination of Interests: Herein of False Conflicts, Renvoi, and the Unprovided-For Case*

Consider next the second, third, and fourth steps of Currie's method. Taken together, these describe what is usually called "false conflict" analysis. When one of the parties suggests that foreign law may apply, the court must determine whether the forum or the foreign state is "interested." Determining state interests is a two-step process: first the court ascertains the "governmental policy" expressed in a law, then the court asks whether "the relation of the [state] to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy."⁴⁴ The process, explains Currie in an important dictum, "is essentially the familiar one of construction or interpretation."⁴⁵ If analysis of the relevant interests indicates that only one state is interested, there is a false conflict and the court should apply the law of the only interested state.

A vast literature on the subject suggests that this must be the most puzzling aspect of interest analysis. Indeed, while I think I basically agree with Currie, his analysis is sufficiently ambiguous that I cannot be sure. Let me therefore begin by explaining how I understand the process of identifying and resolving false conflicts before discussing ways in which my analysis differs from Currie's.

To begin with, I do not think that anyone seriously questions that there are such things as "false conflicts." Everyone agrees that laws have a limited reach and that their scope has something to do with the factual connections between the state and the transaction or occurrence underlying a dispute. Whether a conflict is "true" or "false" thus depends on whether the factual contacts are distributed in such a way

44. Currie, *supra* note 6, at 178.

45. *Id.*

that more than one state's law applies. Strictly speaking, the labels "true" and "false" are misleading, and it would be more accurate to say that there is a conflict or there is not. Currie only used these terms to distinguish the results under interest analysis from those under traditional jurisdiction-selecting rules, which treated every multistate case as a conflict. Hence, cases that are not really conflicts but that would be treated as such by the First Restatement became "false" conflicts. Be that as it may, Currie's terminology has become conventional, which is fine so long as one understands the underlying concept.⁴⁶

Whatever terminology one uses, the problem is to determine which cases fall in which category. Part II-A suggests a way to think about making this determination. I argued there that we should analyze choice-of-law problems in their ordinary procedural context rather than from the broad theoretical perspective of allocating legislative jurisdiction—bottom up rather than top down. The plaintiff alleges facts that he or she claims justify awarding relief under the applicable law; the defendant maintains that a different law governs and bars the plaintiff from recovering. The court's first task is to determine whether a plausible argument can be made for applying both laws, which depends on how we define the elements of a claim or defense based on these laws. Making this determination is equivalent to Currie's "false conflict" analysis.

Recall the hypothetical case discussed above. The plaintiff alleges injury caused by the defendant's gross negligence and seeks punitive damages under a statute authorizing such damages in cases of "vehicular collision." The defendant argues that the plaintiff may recover punitive damages, if at all, only under the state's common law, which requires proof of deliberate intent to injure. The court's first task is to determine whether there is a plausible argument for applying both laws. Thus, as noted above, there is no conflict if "vehicular collision" does not include single car accidents.

The first step is the same in a multistate case. Hence, suppose that the plaintiff is a citizen of Michigan injured in Michigan by a citizen of Illinois. Suppose further that the plaintiff seeks punitive damages under an Illinois statute. The question now is not just whether "vehicular collision" applies to single car accidents, but also whether it includes accidents occurring outside Illinois.

These two problems of interpretation—whether the statute applies to single car accidents and whether it applies to accidents in other states—are similar. With any luck, the statutory language will clearly indicate the elements of a claim. With respect to the question of extra-territorial reach, for example, the statute's applicability to an accident in Michigan would be clear if it authorized punitive damages in cases of

46. In addition to true and false conflicts, there are "unprovided-for" cases in which the factual contacts are distributed such that no law applies. These are discussed below. See *infra* notes 77-86 and accompanying text.

"vehicular collision in this or any other state." There might be a constitutional question about whether Illinois could apply its law to such accidents, and the plaintiff would have to demonstrate some other factual connection to the state. But that is a separate consideration.⁴⁷ The important point is that if a statute expressly specifies its scope, we can determine whether there is a conflict without worrying about "governmental policies" or "interests."

It is, however, highly unlikely that the statute will contain such a provision since very few laws specify their territorial reach. But this simply means that the problem of construction is difficult rather than easy. As where the question is whether "vehicular collision" refers to single car accidents, the court must employ some other interpretive technique to resolve an ambiguity in coverage.

Problems of this sort have received considerable attention in recent years. One solution, advocated most vociferously by Justice Scalia, calls for the court to follow a statute's plain language.⁴⁸ The idea is to read statutes as literally as possible, giving words their common or dictionary meaning without "adding" content through extratextual interpolation or resort to legislative history.⁴⁹ But whatever may be said for this approach as a general matter (which is not much), it is easily rejected in the context of multistate choice-of-law problems.⁵⁰ Because lawmakers seldom say anything about the territorial reach of their laws, plain language analysis means reading laws to apply universally. This, in turn, makes most cases into conflicts between the laws of every state—an obviously absurd result. Even taking constitutional limitations into account, the number of conflicts would be enormous: every multistate case would involve a conflict among the laws of every state with significant contacts.⁵¹ Such an interpretation needlessly maximizes the difficulties

47. Cf. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308-13 (1981).

48. See, e.g., *INS v. Cardoza-Fonseco*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring in the judgment); *Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994-95 (1989) (Scalia, J., concurring in the judgment).

49. See Eskridge, *The New Textualism*, 37 U.C.L.A. L. REV. 621 (1990); C. SUNSTEIN, *supra* note 22, at 113-16; Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1615-16 (1991).

50. Most recent scholarship on interpretation can be criticized on the ground that, while presented as general jurisprudence, the analysis actually deals only with a narrow set of problems associated with federal statutory and constitutional law. This law is unique in many respects, including its subject matter, the professionalism of the enacting legislature, and the separation of powers concern that affect its interpretation and implementation. Given the sensitivity of interpretive norms to institutional concerns, such as the quality of the judges or legislators, no analysis of legal interpretation is complete without some consideration of state law (and probably foreign and international law as well). Many issues that seem easy from a federal perspective are less so from the states' point of view. Conversely, issues that are controversial in the federal context may become relatively straightforward from the perspective of the states. Plain language is an example of the latter, as the results it produces in ordinary choice-of-law cases are totally unacceptable given widely shared assumptions.

51. Cf., e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985).

and tensions created by multistate disputes and is contrary to well recognized principles of comity and mutual accommodation.

There is, moreover, a better way to define the multistate elements of a claim. The court can use a variation of the method it uses to fill gaps and resolve ambiguities in ordinary domestic cases, which is to ascertain the "purpose" of a law and extrapolate from that purpose to the particular situation at hand. A small adjustment in this method is required in the multistate context. In domestic cases, the court is called upon to apply a law to some unforeseen substantive situation, while in multistate cases the substantive circumstances are unchanged and the question concerns the relevance of state boundaries. But this means only that rather than extrapolating from a law's purpose, the court should presume that the law applies only when that purpose is advanced in the state. The process is still essentially the same. In both contexts, the idea is to find the most reasonable interpretation absent any clear expression of actual intent, and that interpretation is presumably the one that advances the law's purposes.⁵²

Some illustrations should clarify how this process of interpretation works. If the purpose of my hypothetical statute governing vehicular collisions is to deter a particular kind of conduct (gross negligence in the operation of a vehicle), the court would interpret it to apply whenever the proscribed conduct occurred within the state. Similarly, if the purposes of ordinary tort recovery rules are compensation and deterrence, these rules would be interpreted to apply whenever the injured plaintiff is either from the state or was injured there. And if the idea behind a guest statute (to take a choice-of-law favorite) is to prevent artificial inflation of insurance rates resulting from collusion, the statute would apply whenever recovery would affect insurance rates in the state (i.e., whenever the defendant's car is garaged there).

These interpretations make the respective laws applicable in the cases that presumably most concerned the state's lawmakers. These lawmakers may, of course, want to do more. They may want to regulate conduct and events in other states, and clear language or legislative history to this effect would support such an interpretation. But where a law is silent with respect to territorial scope, as is true in the vast majority of cases, a narrower construction makes more sense. Consequently, absent some contrary indication, the better interpretation is to presume that a state's law applies only when the factual contacts with the state implicate the law's underlying domestic policy.

I want to clarify this analysis in several respects before comparing it to Currie's. We are interpreting laws to fill a gap or omission in what contact or contacts a state must have for its law to apply. The interpretive technique employed to do this has two components: (1) ascertain-

52. In some cases, the court may have to determine both kinds of elements. In my hypothetical tort case, for example, the court might have to decide both whether "vehicular collision" refers to single car accidents and whether it refers to accidents in other states.

ing the purpose that led to the adoption of a law in wholly domestic cases, and (2) presuming that the law applies only when that purpose is advanced in the state. The first component is based on the idea that law is a purposive endeavor—that laws are adopted for reasons and to accomplish something. Given this, it makes sense to fill gaps or resolve ambiguities by reference to those objectives, and the best interpretation is the one that best accomplishes a law's goals.

This very simple, very sensible idea is at least four hundred years old,⁵³ though today it is generally associated with legal process thinkers, particularly Hart and Sacks.⁵⁴ In recent years, interpretation based on an "attribution of purpose" has been criticized on the ground that statutory purposes are multifarious and concatenated, hence indeterminate and easily manipulated. Hart and Sacks tried to minimize these difficulties by advising courts to interpret laws as if they were written by "reasonable persons pursuing reasonable purposes reasonably."⁵⁵ But as much recent commentary has observed, this is an unrealistic conception of a legislative process that is often controlled by private interests and, even when not, often operates irrationally.⁵⁶ Besides, while a prescription to be reasonable may work if there is a consensus about what acting reasonably means, this exhortation is less useful when—as seems increasingly to be true—fundamental values are contested.⁵⁷

Such criticism notwithstanding, few commentators (and even fewer judges) actually reject purposive interpretation. Instead, they modify the Hart and Sacks approach in a variety of ways to reflect a modern appreciation of the realities of the legislative process and the power of courts to make law.⁵⁸ At one end are public choice models holding that judges should identify and enforce the interest group deals that lie behind legislation.⁵⁹ At the other end are models that highlight the difficulty of reconstructing legislative purposes and advise judges instead

53. See *Heydon's Case*, 76 Eng. Rep. 637, 638 (Ex. 1584).

54. 2 H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1413-17 (tent. ed. 1958).

55. *Id.* at 1415.

56. See, e.g., Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); J. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984); Cohen, March & Olsen, *A Garbage Can Model of Organizational Choice*, 17 ADMIN. SCI. Q. 1 (1972).

57. See C. SUNSTEIN, *supra* note 22, at 130-31.

58. In fairness to Hart and Sacks, I doubt seriously that they thought their model accurately described the legislative process. Post-legal process scholarship may have provided a more richly detailed description of potential defects in the lawmaking process, but the basic insights have long been appreciated. Hart and Sacks undoubtedly recommended the use of a reasonableness canon because they thought it would improve the legislative product.

59. See, e.g., Easterbrook, *1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982). See generally Eskridge & Frickey, *supra* note 22, at 702-10. Professor Jon Macey has used the insights of public choice theory to justify conventional "purposive" interpretation. See Macey, *Promot-*

to engage in a self-consciously creative process of giving laws their "best" interpretation in light of moral or political considerations.⁶⁰ Between these alternatives lie various proposals recognizing the usefulness of historical and legislative background but favoring judicial infusion of values where these materials prove ineffectual or incomplete.⁶¹

There is no need to debate the relative merits of these proposals here. In essence, they all constitute efforts to broaden and deepen the legal process model by including factors Hart and Sacks either overlooked or underemphasized, and by stressing the constructive, inductive nature of the interpretive process. Taken together, the various proposals establish at the very least that determining a law's "purpose" must be understood broadly as a creative search for meaning in a definite social and political context.

For the most part, the lessons of this work on interpretation seem to have been lost on choice-of-law scholars. This is one of Professor Singer's criticisms,⁶² and it is a point well taken. In determining a law's purpose in domestic cases, judges must recognize and be sensitive to the complexity of the issue. At the same time, we should not make a fetish of complicating matters. The truth is that most laws, particularly at the state level, serve relatively straightforward purposes that are either well known or easily identified.

My disagreement with Professor Singer on this issue is thus largely a matter of degree. Yes, I believe judges should be aware of the problematic nature of determining a law's purpose or purposes. But I do not believe that such determinations are so inherently contestable that judges should simply assume that a law applies whenever the state has a contact that makes it constitutionally permissible. The fact that we can imagine alternate stories about a law's purpose does not make these stories all equally plausible. Interpretation calls for judgment. There is, of course, often room to disagree, but that neither delegitimizes the process nor renders it unintelligible.⁶³ Imperfect as the process may be, neither Professor Singer nor any other commentator has convincingly shown that judges cannot make sensible decisions about legal purposes. On the contrary, the long endurance of this method in the face of constantly changing jurisprudential currents suggests that courts are able to

ing Public-Reached Legislation Through Statutory Interpretation: *An Interest Group Model*, 86 COLUM. L. REV. 223, 250-66 (1986).

60. See, e.g., Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

61. See, e.g., R. DWORKIN, *LAW'S EMPIRE* ch. 9 (1986); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479; Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

62. Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197, 206-17 (1991).

63. See Pildes & Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Policies*, 90 COLUM. L. REV. 2121, 2205-10 (1990).

perform this function adequately.⁶⁴

Once the court identifies and articulates the domestic policy underlying a law, the second step in interpreting it is to presume that the law applies only when its policy is advanced in the state. The reason is simple. On the one hand, the positive law of a state reflects the judgment of the state's lawmakers about the best way to organize society. On the other hand, each state's lawmakers presumably recognize that other states may have different views about what is best. The presumption that a state's law applies whenever the domestic policy underlying that law is affected reflects the former principle. The presumption that it does *not* apply when domestic policy is *not* affected reflects the latter. The presumption that a state's law only reaches cases affecting domestic policy thus avoids conflicts while increasing the utility of all states by facilitating each state's ability to regulate matters that affect that state's domestic policies.

One final point should be made about the process of determining whether a conflict is true or false (which is to say, whether there is a conflict or not). Although the analysis focuses on the domestic policies underlying the particular laws at issue, this is not because choice of law is concerned only with such policies. As noted most recently by Professor Singer, lawmakers are also concerned with more general, systemic issues, like discouraging forum shopping or not applying the state's law to a person who could not have predicted it.⁶⁵ But while such policies should not be overlooked, they are not important at this stage of the analysis. This is but a "first cut"—the idea being that there is no reason to apply a state's law if the state's contacts are such that applying the law would not further its underlying domestic policy. If more than one state's domestic policy is affected, further analysis will be needed. We can (and should) consider multistate policies in devising a solution at

64. Professor Glenn Harlan Reynolds draws an elegant analogy to the mathematician's "chaos theory." Like many seemingly simple natural processes that conceal a great deal of complexity (Reynolds discusses a dripping faucet to illustrate his point), one may be unable confidently to predict any particular outcome. It does not follow that the system is not guided by consistent principles or that a coherent pattern will not emerge over many occurrences, for the structure of a system may be coherent and predictable even though no single occurrence is. Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110 (1991).

Professor Singer's disenchantment with false conflict analysis stems in part from his perception that it reflects a form of legal reasoning used only in multistate cases. Hence, he defends his proposal to choose the law that best accords with justice and wise social policy on the ground that this is how courts analyze purely domestic cases. See Singer, *Real Conflicts*, 69 B.U.L. REV. 1, 79-83 (1989). In fact, one seldom sees judicial opinions that make the sort of open-ended inquiry Professor Singer recommends other than in the multistate context (in states that use a "better law" approach). Judicial practice generally conforms to the legal process model.

65. Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 746-55 (1990). Other commentators have also made this point. See, e.g., L. BRILMAYER, *supra* note 8, at 152-54; D. CAVERS, *supra* note 4, at 120-21; Hill, *supra* note 4, at 488-89. As Professor Kay observes, in his later writings Currie also began broadening his approach to account for such policies. Kay, *supra* note 8, at 69-71, 133.

that point.⁶⁶

How does this analysis differ from Currie's? In some ways, not at all. The way Currie determines whether a state is "interested"—ascertaining the "governmental policy" underlying a law and asking whether the relation of the state to the case gives the state a legitimate interest in pursuing that policy—is essentially the same as the interpretive process described above. To say that a state is "interested" is equivalent to saying that the state's factual contacts implicate the domestic policy underlying its law.

At the same time, explaining this process as one of interpreting laws to fill a gap in identifying the elements of a claim requires rethinking important aspects of governmental interest analysis. I shall discuss three examples here: the power of the state to define its own interests, the extent to which interest analysis solves the *renvoi* controversy, and the problem of the unprovided-for case.

First is the question of who defines state interests. Interest analysts appear to believe that while a state is free to choose its own policies, it cannot create a governmental interest through its own actions. Thus, Professor Bruce Posnak explains that while "the policy of a law is subjective, to be determined, where possible, by the state that promulgated the law[,] whether it is reasonable to conclude that those policies would be advanced is objective with the forum having the final say."⁶⁷ On this view, the underlying goal of interest analysis is to ensure the "rational" implementation of state policies in multistate cases. It follows that while states may choose the domestic policies they want to pursue, they may apply laws embodying those policies in multistate cases only if this "rationally" advances the policies involved. For interest analysts, then, an objective test of rationality operates as an external constraint on when states can apply their laws in the multistate context.⁶⁸

Where did Currie get such an idea? The whole point of *Erie Railroad v. Tompkins* is that there is no general law, no "'brooding omnipresence' of Reason,"⁶⁹ that limits states' power to make law. On the contrary, the only external constraints on state lawmaking are those embodied in some authoritative source of positive law, such as the Constitution.⁷⁰ But while decisions defining the constitutional limits of state

66. See *infra* notes 90-108 and accompanying text.

67. Posnak, *Interest Analysis and Its "New Critics"*, 36 AM. J. COMP. L. 681, 687 n.42 (1988); see also Allo, *Methods and Objectives in the Conflict of Laws: A Response*, 35 MERCER L. REV. 565, 579 (1984).

68. Currie never states this explicitly, but it is a fair reading of his work. See Kay, *supra* note 8, at 53-58; Brilmayer, *The Other State's Interests*, 24 CORNELL INT'L L.J. 233, 241 (1991). I am also indebted to Professor Bruce Posnak, who explained this point to me in a personal letter (on file with the author).

69. The paraphrase of Justice Holmes is from Justice Frankfurter's opinion in *Guaranty Trust Co. v. York*, 326 U.S. 99, 102 (1945).

70. State law may also be restricted by federal statutes enacted pursuant to the Constitution. However, Congress has never exercised its power under the full faith and credit clause to legislate choice-of-law rules.

choice of law sometimes speak in terms of "interests," it is abundantly clear that the constitutional test is broader than Currie's.⁷¹ And within these constitutional limitations, states are free to do whatever they want—including subordinating domestic policies in favor of multistate goals like uniformity or predictability, or extending the protection of domestic policy to citizens of other states. Put otherwise, within constitutional limits, states are free to define their interests as they see fit.⁷²

If Currie thought differently, I blame the mistake on his approaching choice of law as a problem of allocating the lawmaking power of states. It is natural from this perspective to think in terms of what states can or cannot do, and to see one's solution as reflecting the permissible limits of legislative jurisdiction. Seen in these terms, interest analysis is still considerably better than the First Restatement, which defines these limits on the basis of arbitrary rules rather than domestic policies. Nonetheless, to the extent that any allocative device is not required by the Constitution, states may take it or leave it.

Approaching choice of law as a problem of defining the elements of a claim or defense clarifies the true nature of the inquiry into domestic policies. The court asks about domestic policies because it must fill in the missing spatial element of a claim or defense, and purposive interpretation remains the most acceptable means of doing this. But the analysis merely identifies a presumptive reading; it does not reflect an external limitation on what the law can provide. State lawmakers are always free to define the applicability of their law in multistate cases differently (so long as they remain within constitutional limits).

This point has several implications for choice of law. It means, of course, that a state can accept the premises of interest analysis and still reject it as a choice-of-law method—adopting even traditional jurisdiction-selecting rules if it wants. This may be unwise. Perhaps the state should forget about uniform, predictably applied choice-of-law rules and concentrate on implementing domestic policies. But states are free to go their own way on these issues.

Second, recognizing that the test of state interests is not objective means that a state's lawmakers can specify the territorial connecting factors that make a law applicable. And if they do, their direction must be taken to define the state's interests whether or not it is consistent with Currie's interest analysis. Only the Constitution limits such decisions.

Finally, recognizing that state interests are not defined objectively means that the *renvoi* remains a problem. Currie thought otherwise.

71. See Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 180 (1981). At one point in her Hague lectures, Professor Kay hints that Currie's test for state interests reflects constitutional standards, Kay, *supra* note 8, at 54, but she later concedes that the test for constitutionally valid interests is "looser" than Currie's. *Id.* at 142-45.

72. I have discussed this point at length elsewhere. Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. — (1991). See also L. BRILMAYER, *supra* note 8, at 72-74, 94-103; Brilmayer, *supra* note 68.

Interest analysis, he suggested, should make the whole renvoi question simply disappear:

Foreign law would be applied only when the court has determined that the foreign state has a legitimate interest in the application of its law and policy to the case at bar and that the forum has none. Hence, there can be no question of applying anything other than the internal law of the foreign state.⁷³

This would make sense if, as Currie believed, states could not determine their own interests. But it makes no sense once we recognize that states are free to define the scope of their laws in multistate cases. The fundamental premise of interest analysis is that choice of law is a process of interpretation. Determining the applicability of another state's law means interpreting that state's law, just as determining the applicability of forum law means interpreting forum law. But interpretation *makes* law; once interpreted, it is as if a law expressly said what the court has construed it to say. There is, moreover, no general common law of interpretation. Each state is free to adopt whatever rules of interpretation it deems appropriate, and these rules are themselves part of the state's positive law. A court in one state called upon to apply another state's law must therefore include whatever rules of interpretation courts in the other state use.

It follows that foreign law must be interpreted in light of foreign choice-of-law rules. A state's approach to choice of law *by definition* establishes that state's rules of interpretation for questions of extraterritorial scope. This is true even if the state's approach was not self-consciously adopted with this thought in mind, for its necessary effect is to define the applicability of the state's laws in multistate cases. A state may, for example, reject Currie's idea that states should be concerned with implementing domestic policies and adhere to the First Restatement on the ground that it furthers predictability and uniformity.⁷⁴ Misguided or not, this decision means that the state has chosen to circumscribe the applicability of its laws according to these rules. Consequently, the rules define the state's "interests" in the only sense in which that concept is meaningful, and they should be respected by the courts of another state.

The problem of the renvoi therefore remains, and the forum must determine how to handle foreign choice-of-law rules. This turns out to be surprisingly complex. Because I have discussed the problem in detail elsewhere, I will limit myself on this occasion to describing conclusions reached there.⁷⁵ All choice-of-law systems necessarily serve two distinct functions. First, they define the internal scope of a state's law and in this way help to determine whether there is a conflict of laws. Second, they

73. Currie, *supra* note 6, at 178-79.

74. See, e.g., *Owen v. Owen*, 444 N.W.2d 710 (S.D. 1989); Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 583-84 (1983).

75. See Kramer, *supra* note 72.

define the circumstances in which the state will forgo enforcing its otherwise applicable law in deference to another state, thus determining how conflicts that are found should be resolved. The proper treatment of foreign choice-of-law rules depends on which of these purposes is being served. To the extent that foreign choice-of-law rules serve the first purpose and define the internal scope of foreign law, they are fully determinative and ought simply to be followed. This follows from everything said above about how choice of law is a process of interpretation and how each state's rules of interpretation are part of that state's positive law.

Matters are more complex when choice-of-law rules serve the second purpose of resolving true conflicts. In this guise, the rules do more than interpret the internal scope of a state's law: they purport to identify a resolution that is best for other states as well. But no state's rule has a privileged status from this multilateral perspective. Accordingly, while the forum should consider whether the foreign state's rule produces a better multistate accommodation of interests, it should adhere to the forum rule so long as it remains convinced that this rule is better for both states (while writing an opinion that seeks to persuade the other state to switch). In traditional choice-of-law parlance, the forum should "reject the renvoi."⁷⁶

Separating the two functions identified above is more difficult under some approaches to choice of law than others. Most modern approaches consist of two steps that explicitly distinguish between these purposes: a first step to determine whether there is a conflict and a second step to resolve whatever conflicts are revealed. Following the analysis suggested above is easy when the other state uses one of these approaches. Other approaches to choice of law—in particular, the Restatements and the various forms of "better law" analysis—merge the two functions and consist of a single inquiry into the applicable law. Careful analysis suggests, however, that these approaches basically presume that a true conflict exists whenever more than one state has significant contacts. The single step of analysis is thus equivalent to the second step of the two-step approaches in seeking to identify an optimal multilateral accommodation of interests. It follows that, so long as the forum remains convinced that its rule for true conflicts is better, it should reject the renvoi and follow the forum rule.

A third way in which the approach outlined in Part II-A exposes errors in Currie's analysis concerns the so-called "unprovided-for" case. As noted above,⁷⁷ a case is unprovided-for when analysis indicates that no state is interested. According to Currie, the court should apply forum law in such cases simply because nothing has displaced the initial

76. The one exception is where the other state uses conventional interest analysis and always applies forum law in true conflicts, in which case the proper response is for the forum to do the same. *Id.*

77. See *supra* note 43.

presumption in favor of that law.⁷⁸ Other interest analysts propose different solutions.⁷⁹ As I have explained elsewhere, however, there is no such thing as an unprovided-for case.⁸⁰ The supposed existence of such cases results from a mistake in the way interests are analyzed—a mistake, I should add, that is directly attributable to the failure to think about choice-of-law disputes in their ordinary procedural context. Properly analyzed, there are clear solutions to these cases.

Currie “discovered” the problem of the unprovided-for case in his study of *Grant v. McAuliffe*.⁸¹ Grant was injured when a car in which he was a passenger collided with a car driven by Pullen. The accident occurred in Arizona, but Grant and Pullen were both citizens of California. Pullen died from his injuries, and McAuliffe was appointed administrator of his estate. Grant sued the estate in California. Arizona followed the common law rule that a tort action abates if it is not commenced before the death of the tortfeasor. California had abrogated this rule by statute.

Currie used the case to illustrate how interest analysis works, varying the location of the relevant facts to generate and then resolve a series of hypotheticals. The unprovided-for case turned up in Currie’s tenth hypothetical: a plaintiff from Arizona injured in Arizona by a California tortfeasor. Currie reasoned that Arizona bars recovery so that “the interests represented in the estate of the tort-feasor . . . should not suffer because of what he did.”⁸² Therefore, applying Arizona law on the facts of the tenth hypothetical would advance no Arizona interest: “Though the injured person is both a resident of Arizona and is injured there, Arizona has no policy of compensation for him.”⁸³ California, in contrast, permits recovery, favoring the injured person’s interest in being compensated. However, because the plaintiff in the tenth hypothetical is from Arizona, applying California law would advance no California interest.⁸⁴ The case is thus unprovided-for because “[n]either state cares what happens.”⁸⁵

78. Currie, *SELECTED ESSAYS*, *supra* note 3, at 156.

79. See, e.g., D. CAVERS, *supra* note 4, at 106 (apply the law of the other state); Posnak, *Choice of Law: A Very Well-Curried Leflar Approach*, 34 *MERCER L. REV.* 731, 777-83 (1983) (choose according to Leflar’s “choice influencing considerations”); Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 *UCLA L. REV.* 181, 233-36 (1977) (apply the law that reflects the common policy).

80. The analysis in this section borrows from an earlier study of the problem. See Kramer, *The Myth of the “Unprovided-For” Case*, 74 *VA. L. REV.* 1045 (1989).

81. 41 Cal. 2d 859, 264 P.2d 944 (1953). See Currie, *SELECTED ESSAYS*, *supra* note 3, ch. 3.

82. Currie, *SELECTED ESSAYS*, *supra* note 3, at 144. I agree with Professor Singer, *supra* note 62, at 211-13, that this interpretation is questionable. See Kramer, *supra* note 72, at 1048 n.21. However, because my purpose is to demonstrate how interest analysis has been misapplied, I shall assume that Currie’s understanding of Arizona policy is correct.

83. Currie, *SELECTED ESSAYS*, *supra* note 3, at 152.

84. *Id.*

85. *Id.*

Consider how Currie analyzes this case. There is a choice-of-law problem because there are multistate contacts, but the problem is merely one of choosing between California and Arizona. Once a choice is made, the case is decided as if it were wholly domestic to the chosen state. Hence, Currie assumes that if Arizona law is applied, the case will be dismissed because that is what Arizona does in domestic cases; if California law is applied, the case will go forward because that is what California does in domestic cases. The problem in an unprovided-for case is that the reason each state does what it does in a domestic case is missing: there is no Arizona estate or California tort victim to protect. As a result, neither state cares whether its law is applied, and there is no reason to apply either of them.

By now, it should come as no surprise if I suggest that only someone who—like Currie—defines choice of law as a problem of choosing between states would analyze the case this way. If instead one analyzes the case as it comes to the court, that is, as a problem of deciding whether plaintiff states a claim or defendant has a defense, the fallacy in this reasoning becomes apparent—as does the proper solution.

A plaintiff files a complaint alleging that he or she, a citizen of Arizona, was injured in Arizona due to the negligence of the defendant, a citizen of California. The defendant moves to dismiss on the ground that the plaintiff is not entitled to recover on these facts. The first question is, what law does the plaintiff rely on for a right to recover? Following the interpretive method described above, the plaintiff cannot rely on California law. Tort recovery rules are adopted in order to compensate injured victims and to deter conduct the state wishes to discourage.⁸⁶ We therefore presume that California extends a right to recover to victims who are either from California or who were injured there. Because California's only contact in this case is that it is the tortfeasor's domicile, plaintiff must look to the law of some other state for a right to recover.

How about Arizona law? Arizona, like California, gives injured plaintiffs a right to recover from negligent defendants. Moreover, as in California, because the policies underlying this law are compensation and deterrence, we presume that Arizona gives this right to plaintiffs who are either from Arizona or were injured there. The plaintiff in Currie's tenth hypothetical satisfies both conditions and can therefore claim a right to relief under Arizona law.

The defendant, of course, answers that under Arizona law the plaintiff's claim abated when the tortfeasor died. Consequently, defendant argues, the plaintiff's claim should be dismissed. Still following the interpretive approach described above, however, the abatement rule does not apply on these facts. Arizona confers a "right" on estates to

86. A state might adopt tort recovery rules for some other reason, but compensation and deterrence are generally accepted as the applicable policies, and courts in most states would probably interpret their law according to such policies. I therefore make this assumption to illustrate my point. The analysis might change, of course, if Arizona or California law were interpreted to reflect different policies.

have a plaintiff's tort claim dismissed in order to protect the nonculpable interests they represent. Assuming this is its policy, Arizona presumably extends this right only to Arizona estates, leaving other states free to regulate their estates as they see fit. Because the defendant is a California estate, it does not meet the conditions for asserting a right based on Arizona's abatement rule.⁸⁷

The case is thus not unprovided-for at all: the plaintiff has a right to recover under Arizona law.⁸⁸ Currie overlooked this result only because he mistakenly assumed that applying Arizona law necessarily meant dismissing the case under Arizona's abatement rule. But that is what Arizona provides in a case with no foreign elements. On the facts of *this* case, Arizona allows the plaintiff to recover; the conflict is "false." As I have argued elsewhere, moreover, analyzing cases this way provides an equally clear solution in every case that is currently labeled "unprovided-for."⁸⁹ Once we approach choice of law from the proper perspective, the problem of the unprovided-for case disappears.

3. *True Conflicts*

Finally, consider Currie's fifth step, which presents his solution to true conflicts: "If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy"⁹⁰ I already quoted Currie's explanation, which is that courts lack the authority and resources to provide a genuine answer in these cases because that requires weighing the competing interests of sovereign states.⁹¹ But true conflicts must still be decided, and while applying forum law may not be an ideal solution, Currie says, it is the best solution available:

There remains the stubborn fact that under any conceivable conflict-of-laws method the interests of one state will be sacrificed to those of another whenever there is conflict. The only virtue of the method proposed here is that it at least makes the choice of interests on a rational and objective basis: the forum consistently applies its own law in case of conflict, and thus at least advances its domestic policy.⁹²

This was not Currie's last word on the subject of true conflicts. Responding to critics who attacked interest analysis as excessively paro-

87. Although I have described the analysis in terms of the "right" of the defendant-estate, nothing important turns on this description; one could just as easily talk about a limitation on the plaintiff's claim. The point is simply that if this "limitation" is designed to protect estate interests, we presume that it comes into play only when an Arizona estate is involved.

88. Note, however, that the privileges and immunities clause might require an Arizona court to give defendant the benefit of Arizona's abatement rule. Kramer, *supra* note 72, at 1065-74.

89. *See id.* at 1045-64.

90. Currie, *supra* note 6, at 178.

91. *See supra* note 19 (quoting Currie, *supra* note 6, at 176).

92. Currie, *SELECTED ESSAYS*, *supra* note 3, at 169.

chial, Currie modified his approach by recognizing an intermediate step enabling courts to avoid at least some true conflicts:

[A]nalysis may at first indicate an apparent conflict of interests; specifically, it may be clear that *if* the forum were to assert an interest in the application of its policy, it would be constitutionally justified in doing so. But no principle dictates that a state exploit every possible conflict, or exert to the outermost limits its constitutional power. On the contrary, to assert a conflict between the interests of the forum and the foreign state is a serious matter; the mere fact that a suggested broad conception of a local interest will create conflict with that of a foreign state is a sound reason why the conception should be re-examined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose.⁹³

Not all true conflicts can be avoided this way. In many cases, Currie notes, both states will be unavoidably interested, and the court should continue to resolve such "intractable problems" by applying forum law.⁹⁴ But at least some apparent true conflicts can be resolved by giving forum law a "moderate and restrained interpretation" in the interest of comity. The process, exemplified by Chief Justice Traynor's opinion in *Bernkrant v. Fowler*,⁹⁵ is discretionary and necessarily ad hoc.⁹⁶

Currie's treatment of true conflicts rests on two assumptions. First, Currie assumes that the only genuine solution is to weigh or balance the competing policies and choose the more "enlightened" one—something, he argues, that only the U.S. Congress has the authority and resources to do.⁹⁷ Second, Currie believes that any solution based on

93. Currie, *The Disinterested Third State*, *supra* note 30, at 757. This intermediate step is hinted at near the end of *Notes on Methods*, *supra* note 6, at 180 (noting that "there is room for restraint and enlightenment in the determination of what state policy is and where state interests lie"). It is more fully developed in Currie's study of the *Romero* case, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959), and expressly incorporated into Currie's final methodological list of steps to follow in analyzing a choice of law problem. See Kay, *supra* note 8, at 76.

94. Currie, *The Disinterested Third State*, *supra* note 30, at 763-64.

95. 55 Cal. 2d 588, 360 P.2d 906 (1961).

96. See Currie, *The Disinterested Third State*, *supra* note 30, at 764. It is unclear whether Currie thought the forum could also reinterpret foreign law in this manner. On the one hand, Currie's final list states that "[a] more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict." Kay, *supra* note 8, at 76. On the other hand, Currie's analysis and illustrations all involve a forum reinterpreting its own law, and anything else seems inconsistent with the whole thrust of his analysis. The better reading therefore seems to be that Currie's intermediate step refers only to reinterpreting forum law.

97. See, e.g., Currie, *SELECTED ESSAYS*, *supra* note 3, at 117, 121-27, 167-70; Currie, *supra* note 6, at 176-77. Several critics suggested that reading forum law narrowly in deference to another state's interests is indistinguishable from balancing. See Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732, 734 n.9 (1963); Hill, *supra* note 4, at 476-77. Currie responded:

[T]hough the function is essentially the same, there is an important difference between a court's construing domestic law with moderation in order to avoid conflict with a foreign interest and its holding that the foreign interest is paramount. When a court avowedly uses the tools of construction and

weighing is zero-sum, because the gain to one state from having its policy advanced is matched by the other state's identical loss. Until Congress acts, then, the most "rational" thing a court can do is to apply its own law and at least advance domestic policy—except that sometimes the court may want to interpret its law narrowly to avoid conflict in the service of restraint and altruism.

To understand what is wrong with this reasoning, we must consider the relevant interests more carefully. Bear in mind, we are still engaged in a process of interpretation—of defining the circumstances in which a law should be construed to confer a right. Having examined each law independently and having found the domestic policies of both implicated, this fact itself becomes relevant. How is the ultimate enforceability of a state's law affected by the concurrent applicability of another state's law? Once again, this would be easy if laws included express directions, but such provisions are rare. Accordingly, as in domestic cases, the court must develop some further set of interpretive principles to guide its decisions.

One concern (though, as explained below, not the only one) is implementing the policies underlying the state's particular laws. Currie assumes that always applying forum law is the best way to do this, which would be true if every conflict was litigated in the forum. In practice, however, states have little control over where suits are brought, and many true conflicts will undoubtedly be litigated elsewhere. The states' interests are thus interdependent in the sense that each state needs cooperation from other states to implement its policies.

It follows that enforcing foreign law in appropriate cases may actually be a better way to implement forum policy because it invites reciprocal action that advances forum policies in cases brought elsewhere. If every state adopts a "law of the forum" solution and always enforces its own law in true conflicts, each state's policies will be advanced only in true conflicts litigated in that state's courts. But states presumably care more about some true conflicts than others, because some true conflicts either affect more important purposes of the states' laws or affect these purposes in more important ways. And between forum shopping and declaratory relief (which enables potential defendants to shop for a forum), there is no assurance that these cases will be litigated in the state. Consequently, even from a purely selfish and parochial stand-

interpretation it invites legislative correction of error—or at least criticism from the law reviews. When it weighs state interests and finds a foreign interest weightier it inhibits legislative intervention and confounds criticism.

Currie, *The Disinterested Third State*, *supra* note 30, at 759. This is a curious answer. I agree that courts can resolve true conflicts by interpreting laws without "weighing" policies against some objective standard of value. But I do not see what that has to do with inviting or confounding legislative correction. Whether the court reinterprets forum law ala Currie or declares a foreign interest superior, nothing prevents the state's legislators from overturning the decision (and certainly nothing prevents law review commentators from criticizing it). The legislature need merely pass a law instructing the court to apply forum law.

point, it may be advantageous for the forum sometimes to defer to foreign law in order to encourage other states to do the same.

Moreover, no state is interested only in advancing the domestic policies underlying its particular laws. Rather, states also have systemic concerns or "multistate policies" that point toward the application of foreign law in appropriate cases.⁹⁸ These policies include comity toward other states, facilitating multistate activity, providing a legal regime whose enforcement is uniform and predictable, and discouraging forum shopping. While not embodied in specific laws, such multistate policies nevertheless constitute an identifiable state concern that courts should not ignore.

This analysis suggests first that, rather than being zero-sum, choice of law is a variable-sum game in which some approaches to conflict resolution are better for both states than others. This follows from two points made above: (1) that states care more about some true conflicts than others, and (2) that states have minimal control over where suits are brought and cannot be sure that the cases they care about most will be litigated in their courts. To be sure, because only one state's law can be applied in any particular true conflict, neither state is able perfectly to implement its policies. But some solutions may apply each state's law in more of the cases each state cares about most. By making choice of law turn on policy preferences rather than where suit is brought, then, we can *maximize* the extent to which states realize their objectives in multistate cases. These gains may be further increased if our solution also advances shared multistate policies.

Second, an approach based on maximizing state interests does not require "balancing" or "weighing" the relative merit of state policies. Rather than ask whether one state's law is "better" than another's in some objective sense, we look for shared policies or policy preferences around which to make trade-offs that enhance the likelihood that states' laws are enforced in the cases they care about most. This may require identifying preferences within each state, but even Currie acknowledged the legitimacy of that inquiry when he recognized the courts' power to give forum law a moderate and restrained interpretation.

Third, it is in the states' interests to articulate the desired trade-offs in the form of rules rather than, as Currie suggested, on an ad hoc basis.⁹⁹ This is so for at least two reasons. To begin with, a system of rules does a better job of advancing multistate policies. Discouraging forum shopping, ensuring uniform and predictable results, and facilitat-

98. See *supra* note 65 and accompanying text.

99. See *supra* note 96 and accompanying text. It is far from clear that Currie saw his intermediate step as achieving the sort of accommodation I am suggesting. In fact, it is not entirely clear what Currie thought a court should consider in deciding whether to interpret forum law narrowly, because he never discussed the issue in any systematic way. As articulated in his late work—and no subsequent commentator has developed the idea in greater detail—Currie's intermediate step amounts to making a decision by intuition in light of vague suggestions to be "altruistic," "enlightened," "restrained," and like Chief Justice Traynor in *Bernkrant v. Fowler*.

ing multistate activity, for example, all depend on increasing the likelihood that a known result will be reached in the courts of any state. Obviously, no system of rules can do this perfectly. Rules may be manipulated, and it is impossible to avoid a certain amount of ad hoc analysis in administering them.¹⁰⁰ But a system that begins with and emphasizes articulated rules will provide more predictability and uniformity than an avowedly ad hoc approach.¹⁰¹ This, in turn, will create a more stable multistate system that—other things being equal—should facilitate multistate activity and foster interstate cooperation.

More important, the approach to true conflicts suggested above requires reciprocity from other states. The premise is that states can maximize the extent to which they implement their substantive policies by deferring to foreign law in appropriate cases. But this works only if other states follow suit, for only then is a state's forbearance repaid by the reciprocal forbearance of others, and only then will we achieve any sort of uniformity in outcomes. But states cannot cooperate in this fashion without the ability both to coordinate their handling of true conflicts and to monitor each other's compliance—and that requires a system of articulated rules for reference.¹⁰²

What we need, then, is a set of interpretive rules designed to maximize state interests. Several strategies are available to develop rules that satisfy this condition. First, we can identify situations in which both states are more concerned with one type of policy than another. If courts in both states then apply the law reflecting this preferred policy—regardless of whose law it is in any particular case—both states should benefit over time. Second, we can identify a shared third policy around which to construct a tiebreaking rule. Because the conflicting interests underlying specific laws will presumably balance out over time and many cases, choosing the law that consistently advances the shared third policy again yields a marginal benefit to both states.

Translating these (and perhaps other) strategies into a workable system of rules is not easy. Elsewhere, I presented five illustrations of what such rules might look like.¹⁰³ Rather than repeat or expand on them here, let me simply offer several observations about the process of formulating additional rules. First, the critical feature of these rules is that they select an applicable law on the basis of the underlying policy that will maximize both states' interests over time. The rules are thus "policy-selecting" in contrast to the traditional "jurisdiction-selecting"

100. See Singer, *supra* note 64, at 7-33.

101. Apart from common sense, this empirical assertion finds support in the growing consensus among choice-of-law scholars that rules of some sort may be appropriate after all. See Kramer, *supra* note 25, at 320-21 & n.147 (citing authorities).

102. The full story of how and why states may come to cooperate in choice-of-law cases is considerably more involved. For present purposes, it suffices merely to note that rules are critical to the enterprise. These issues are discussed further in *id.* at 339-45; and Kramer, *supra* note 72.

103. See Kramer, *supra* note 25, at 319-38.

rules whose chief flaw was that they operated without regard for the content of the laws in conflict.

Second, it would be a mistake to try to derive a comprehensive system of policy-selecting rules from a single theoretical premise. Resolving true conflicts is a process of accommodating conflicting and overlapping substantive concerns that are enormously varied. Any effort to articulate a single theory that encompasses so much variety is likely to become so general as to be useless. (Is this not the lesson of the Second Restatement?) The rules of interpretation used in domestic cases are not derived from a single theory, and there is no reason to expect anything different in the multistate context.

Third, domestic conflicts can be an important source of information for multistate cases. To be sure, many solutions developed in the domestic context are inappropriate in the multistate setting, because they rest either on the fact that the conflicting laws come from a single lawmaker¹⁰⁴ or on a normative preference for one lawmaker over another.¹⁰⁵ But patterns observed in settling domestic conflicts may be helpful in formulating multistate solutions. For example, when conflicts arise between substantive and procedural policies in wholly domestic cases, courts typically favor the substantive rule.¹⁰⁶ This suggests that states share a preference for substantive policies, which may provide the basis for a multistate rule. If this observation is correct, a rule that chooses the law reflecting a substantive policy in clashes between one state's procedural and another state's substantive law will systematically advance the preferred policies of both states: the forum sacrifices its procedural policies in favor of another state's substantive policies, but gains since its substantive law will similarly be respected in cases outside the forum.¹⁰⁷ There are undoubtedly other, similar patterns in the resolution of domestic conflicts, and these should provide a valuable source of ideas for policy-selecting rules.

Finally, multistate policies may also provide substantive guides for formulating rules to resolve true conflicts. Precisely because these policies are widely shared, they can serve as tiebreakers where the states' particular domestic policies conflict. To illustrate, lawmakers in all states presumably would agree that where the choice among legitimate options is ambiguous, a party is presumptively entitled to the benefit of an option on which he or she actually and reasonably relied. In wholly domestic cases, the court may ignore this fairness consideration in order to advance the policy underlying the law not relied on. In a multistate case, however, that substantive policy is matched by the policy of

104. This is true, for example, of both the idea that laws can be read *in pari materia* and the canon that implied repeals are disfavored.

105. This explains, for example, the canon that statutory law trumps common law and its predecessor that statutes in derogation of the common law should be construed narrowly.

106. Kramer, *supra* note 25, at 328 & n.174 (citing cases).

107. *Id.* at 324-29.

another state. We can break the tie by choosing the law on which the parties actually relied. The state whose law is not applied forgoes an opportunity to advance the policy underlying its law, but enhances the likelihood that its law will be applied in other cases if the parties rely on it. At the same time, the rule systematically advances the shared third policy of fairness.¹⁰⁸ Other multistate policies may similarly be useful in particular situations as a basis for policy-selecting rules to resolve true conflicts.

Conclusion

The analysis in Part II contains all the elements of an approach to analyzing choice-of-law disputes. Therefore, if I may imitate Currie's practice of listing steps to follow in resolving choice-of-law disputes, rethinking the process in terms of defining the elements of a claim implies a method along the following lines:

1. The legal sufficiency of a claim or defense may be presumed unless and until challenged by a party-opponent. If properly challenged, the party asserting the claim or defense must produce legal authority to establish its validity.

2. If the parties raise a dispute involving inconsistent laws from different states, the court should first determine whether there is a plausible basis for finding both laws applicable.

- (a) To decide whether forum law may apply, the court should determine what policy or policies led to its adoption in wholly domestic cases. The law is *prima facie* applicable if the state's factual contacts implicate these policies in the state.

- (b) The *prima facie* applicability of another state's law is determined by the decisions of courts in that state. If there are no decisions on point, the forum should determine *prima facie* applicability in light of the other state's approach to choice of law.

3. This analysis may reveal that there is no conflict of laws because only one law applies or the laws are not inconsistent or they provide cumulative remedies. The court should dispose of such cases accordingly.

4. If the analysis reveals that there is a "true conflict" because more than one law is *prima facie* applicable and these laws are inconsistent, the court should resolve it by following an appropriate policy-selecting rule. These are rules which, if applied by both states, maximize both states' interests.

5. If the other state uses a different rule to resolve true conflicts, the court should reconsider its rule and ask whether the foreign rule produces a superior multistate accommodation of interests. If it does, or if the rules are indistinguishable in this regard, the forum should adopt the other state's rule. Otherwise, the forum should follow its own rule and write an opinion explaining why it is better. There is an exception if the other state follows a consistent practice—either explicit or implicit—of applying its own law in true conflict cases. If that is the situation, the

108. *Id.* at 336-38.

forum should do the same and apply its own law.¹⁰⁹

This list outlines a method for resolving choice-of-law problems. Considerable work is still needed to fill in the details. The most important area for future research is in developing policy-selecting rules for true conflicts. As noted above,¹¹⁰ this cannot be done on the level of general theory. We need to examine particular issue-areas and to develop, test, and debate concrete proposals. Lea Brilmayer suggests that ultimately we may need a Third Restatement so that courts can adopt a comprehensive choice-of-law code.¹¹¹ Perhaps she is correct, but in the meantime it is up to us—scholars, students, lawyers, and judges—to begin developing some of the specific solutions that might constitute the body of such a code.

109. Various aspects of this method are discussed in greater detail elsewhere. The treatment of foreign choice-of-law rules in steps 2(b) and 5 is explained in Kramer, *supra* note 72, while the interpretive process described in steps 2(a), 3, and 4 is defended in *id.*; and in Kramer, *supra* note 25.

110. See *supra* p. 276.

111. L. BRILMAYER, *supra* note 8, at 185-89. I am more sanguine than she about the possibility of multistate cooperation through common law adjudication, but agree that a developed code of some sort is desirable. See Kramer, *supra* note 72. Given the limitations of the restatement project, a uniform law is preferable since it can more readily abandon or modify unsatisfactory aspects of existing practice. Kramer, *On the Need for a Uniform Choice of Law Code*, 90 MICH. L. REV. — (1991).